

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UTAHAMERICAN ENERGY, INC.
794 N 'C' Canyon Road
East Carbon, Utah 84520
(435) 888-4016,

Plaintiff,

v.

MINE SAFETY AND HEALTH
ADMINISTRATION
U.S. Department of Labor
1100 Wilson Boulevard
Arlington, Virginia 22209-3939
(202) 693-9414,

Defendant.

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiff UtahAmerican Energy, Inc. ("UEI") brings this action seeking declaratory and injunctive relief against Defendant Mine Safety and Health Administration ("MSHA") for its failure to comply with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In support of this complaint, UEI alleges as follows:

Parties

2. Plaintiff UEI is a corporation organized under the laws of the State of Utah. UEI is the parent corporation of Andalex Resources, Inc., which in turn is the parent corporation of

Genwal Resources, Inc. Genwal Resources, Inc. is a co-owner and operator of the Crandall Canyon Mine, an underground coal mine in Huntington, Utah.

3. Defendant MSHA is an agency within the U.S. Department of Labor. MSHA's headquarters are located at 1100 Wilson Boulevard in Arlington, Virginia. MSHA is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

Jurisdiction and Venue

4. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue is appropriate in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

Factual Allegations

6. On August 6, 2007, a part of the Crandall Canyon mine collapsed, killing six miners. Ten days later, on August 16, 2007, during rescue and recovery operations, a second accident occurred, causing the deaths of three rescuers.

7. The events leading to the two accidents, the accidents themselves, and activities during the rescue and recovery operations were the subject of multiple government investigations, including but not limited to MSHA's statutorily-mandated fatality investigation and separate investigations by, among others, the Office of the Inspector General at the U.S. Department of Labor, the Chairman of the U.S. Senate Committee on Health, Education, Labor and Pensions ("HELP Committee"), and the Chairman of the U.S. House of Representatives Committee on Education and Labor.

8. By hand-delivered letter dated September 25, 2007, through counsel, UEI requested that MSHA produce documents pursuant to FOIA. Specifically, UEI requested that MSHA produce the following (collectively, the "Requested Documents"):

- Any and all documents in the actual or constructive possession of [MSHA], which relate in any way to the Crandall Canyon Mine, including but not limited to, studies, reports, plans, inspections, orders, memoranda, correspondence, e-mails, and any other electronically stored information.
- Any and all documents in the actual or constructive possession of MSHA, which relate in any way to the August 6th and August 16th incidents at the Crandall Canyon Mine, and which have been or will be forwarded or produced to any of the following entities by MSHA:
 - The U.S. Department of Labor, Office of Inspector General ("OIG") in furtherance of the OIG's oversight of MSHA.
 - The Committee on Education and Labor, U. S. House of Representatives, in response to the August 27 and September 4 letters to Secretary of Labor Elaine L. Chao from Education and Labor Committee Chairman George Miller; and
 - The Committee on Health, Education, Labor, and Pensions, United States Senate ("HELP Committee"), in response to the August 23, 2007 letter to Secretary Chao from Senator Edward M. Kennedy, Chairman of the HELP Committee and the September 13, 2007 letter to Secretary Chao from Senator Kennedy and Senator Patty Murray, Chair of the Senate Subcommittee on Employment and Workplace Safety.

A copy of UEI's September 25, 2007 FOIA request is attached hereto as Exhibit A. MSHA assigned Tracking No. F2007-502283 to the FOIA request.

9. FOIA requires that an agency shall "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of [a FOIA] request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i).

10. On October 22, 2007, two days before MSHA's set time to respond pursuant to 5 U.S.C. § 552(a)(6)(A)(i) had elapsed, counsel for UEI contacted counsel for MSHA by e-mail concerning the status of UEI's FOIA request, to which MSHA had not yet responded. In that e-mail, counsel for UEI noted the upcoming statutory deadline for MSHA's response, acknowledged the broad scope of the FOIA request, and offered to accept a partial response as an interim measure.

11. Between October 22, 2007 and October 25, 2007, counsel for UEI and counsel for MSHA exchanged a number of e-mails about the FOIA response, ultimately agreeing that in "partial response," MSHA would go ahead and produce to UEI a portion of the Requested Documents relating to Crandall Canyon Mine and a portion of the Requested Documents that had previously been provided to the HELP Committee, pending the continued processing of UEI's request. A copy of counsels' e-mail correspondence is attached hereto as Exhibit B.

12. Finally, three months later, by letter dated February 12, 2008, MSHA released some documents to UEI in furtherance of the promised "partial response" to the request. In its partial response, MSHA advised UEI that it was redacting information in those documents pursuant to FOIA Exemptions 5, 6, 7(A), and 7(C), 5 U.S.C. §§ 552(b)(5), 552(b)(6), 552(b)(7)(A), 552(b)(7)(C). This information was improperly withheld and must be released to UEI. A copy of MSHA's partial FOIA response is attached hereto as Exhibit C.

13. MSHA did not provide an index or otherwise identify all withheld documents.

FOIA requires that the documents withheld from disclosure and material redacted from documents clearly indicate how much information has been withheld and pursuant to which FOIA exemption(s).

14. The materials that MSHA produced on February 12, 2008 purported to respond to the first category of documents requested (those “which relate in any way to the Crandall Canyon Mine”) and to respond “in part” to the request for documents produced to the HELP Committee.

15. On information and belief, even the documents that MSHA produced on February 12, 2008 in partial response to UEI’s FOIA request constituted only a small portion of the documents in MSHA’s possession that are responsive to UEI’s request for documents that relate to the Crandall Canyon Mine and only a small portion of the documents in its possession that are responsive to the FOIA request for documents that MSHA had previously produced to the HELP Committee. Yet, in the transmittal letter that accompanied MSHA’s partial FOIA response (Ex. C), MSHA never advised UEI that it possessed additional documents that are responsive to these two categories of request, but which it was neither producing in response to the request nor withholding pursuant to a FOIA exemption.

16. In its February 12, 2008 partial response, MSHA did not produce any documents in response to UEI’s request for documents (1) that had been produced to the Office of the Inspector General or (2) that had been provided to the House Committee on Education and Labor. Further, MSHA did not explain when, or even whether, any response to those two portions of UEI’s FOIA request, or to the unanswered portion of UEI’s request for documents

provided to the HELP Committee (much less the remainder of the documents “which in any way relate to the Crandall Canyon Mine,” probably because it purported to have fully provided all such documents) would be provided.

17. By letter filed electronically on May 9, 2008, UEI timely appealed MSHA’s assertion of FOIA Exemptions 5 and 7(A) as to some of the documents that it had withheld from production or redacted in its February 12, 2008 partial response. UEI also appealed MSHA’s failure to produce or even to identify the remainder of the documents responsive to the September 25, 2007 request, including any documents responsive to two entire categories that were requested but not even addressed by MSHA. The appeal was filed electronically with the Solicitor of Labor pursuant to 29 C.F.R. § 70.22(c). A copy of UEI’s FOIA appeal is attached hereto as Exhibit D.

18. FOIA requires that an agency “make a determination with respect to any appeal” of an agency determination of a FOIA request “within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.” 5 U.S.C. § 552(a)(6)(A)(ii).

19. Nearly a month after UEI had filed its appeal, the Office of the Solicitor notified counsel for UEI by letter dated June 5, 2008 that the appeal, assigned Reference No. 080228, had been received and was being processed. A copy of the acknowledgment is attached hereto as Exhibit E. However, that letter did not make a determination on the merits of UEI’s appeal.

20. On July 14, 2008, MSHA advised counsel for UEI that upon advance payment of half of the estimated fee of \$14,000.00, MSHA would begin to process its response to the portions of UEI’s September 25, 2007 FOIA request to which it had not previously responded. MSHA estimated that UEI would receive a “final response within 180 days of initiating a review

of this material.” However, the request was at that point on appeal in the Office of the Solicitor. A copy of MSHA’s July 14, 2008 letter is attached hereto as Exhibit F.

21. On August 1, 2008, by check dated that day, counsel for UEI provided the requested advance payment of \$7,000.00 to MSHA. MSHA acknowledged receipt of the payment by letter dated September 8, 2008. In that same letter, MSHA advised without explanation that UEI’s FOIA request had been transferred to MSHA’s “Office of Assessments, Technical Compliance and Investigations Office [sic].” However, the request was at that point on appeal in the Office of the Solicitor. A copy of MSHA’s September 8, 2008 letter is attached hereto as Exhibit G.

22. Although pursuant to 5 U.S.C. § 552(a)(6)(A)(i) MSHA was required to have responded to the initial FOIA request within twenty business days of its receipt of UEI’s September 25, 2007 request, MSHA provided no documents by that deadline. Moreover, MSHA to date has provided only a partial disclosure on two categories of requested documents, and no disclosure at all on two other categories of requested documents.

23. Although pursuant to 5 U.S.C. § 552(a)(6)(A)(ii) the Solicitor of Labor was required to decide the appeal within twenty business days of its receipt of UEI’s May 9, 2008 appeal, to date the Solicitor has failed to decide the appeal.

24. MSHA has produced no additional Requested Documents, nor has it acknowledged withholding Requested Documents pursuant to a FOIA exemption, since February 12, 2008.

25. Because the Defendant has failed to comply with the time limits set forth in 5 U.S.C. § 552(a)(6)(A), UEI is deemed to have exhausted its administrative remedies and is entitled to seek immediate judicial review pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

26. MSHA's: (1) failure to meet the statutory deadline for fully responding to UEI's request; (2) failure to issue a timely decision on UEI's appeal of MSHA's partial response and its more than three-month delay in providing that partial response; (3) failure to disclose in its partial response the existence of additional responsive documents; (4) failure to explain when or whether those and other Requested Documents would be produced; (5) nearly one-month delay in notifying UEI of receipt of UEI's appeal; (6) announced intent to delay up to an additional 180 days in providing a final response after UEI prepaid half of the estimated response fee; (7) unexplained transfer of UEI's request to a different component of MSHA after UEI's request had been pending for over 11 months; (8) ongoing failure to produce any additional documents beyond those produced in the February 12, 2008 partial response; and (9) ongoing failure to decide UEI's appeal, constitute an arbitrary, capricious, and unlawful pattern and practice by MSHA to deny UEI access to material to which it is entitled by law.

CLAIMS FOR RELIEF

COUNT I

Declaratory Judgment

Failure to Produce Records

5 U.S.C. § 552(a)(3); 28 U.S.C. §§ 2201 and 2202

27. UEI hereby re-alleges and incorporates paragraphs 1 through 26 of this Complaint as if fully set forth herein.

28. FOIA requires that, upon proper request for disclosure of records, an agency "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3).

29. The Requested Documents are agency records within MSHA's control. UEI, through counsel, properly requested production of the Requested Documents. UEI is entitled by law to obtain copies of the Requested Documents. MSHA has failed to produce the Requested Documents in violation of FOIA.

30. Further, MSHA has improperly asserted FOIA exemptions as a basis for withholding or redacting portions of the Requested Documents, in violation of FOIA.

31. Further, MSHA has improperly failed to provide an index to UEI or to otherwise identify all withheld documents and redacted material.

32. UEI requests a declaratory judgment that MSHA has violated FOIA and that UEI is entitled to receive the Requested Documents, and previously withheld or redacted portions of the Requested Documents, immediately.

COUNT II
Declaratory Judgment
Arbitrary and Capricious Withholding of Records
5 U.S.C. § 552(a)(4)(F); 28 U.S.C. §§ 2201 and 2202

33. UEI hereby re-alleges and incorporates paragraphs 1 through 32 of this Complaint as if fully set forth herein.

34. FOIA provides that "[w]henver the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against

the officer or employee who was primarily responsible for the withholding. . . .” 5 U.S.C. § 552(a)(4)(F).

35. MSHA’s failure to produce, delays in producing, and withholding of portions of, the Requested Documents, failure to identify those documents being withheld and a FOIA exemption that would justify such withholding, and failure to process UEI’s appeal, as summarized in Paragraph 26 above, constitute an arbitrary, capricious, and unlawful pattern and practice by MSHA to deny UEI access to material to which it is entitled by law.

36. UEI requests a declaratory judgment that MSHA personnel acted arbitrarily and capriciously in MSHA’s processing of UEI’s FOIA request and appeal.

COUNT III
Injunctive Relief for Failure to Produce Records Under FOIA
5 U.S.C. §§ 552(a)(3)(A) and 552(a)(4)(B)

37. UEI hereby re-alleges and incorporates paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. FOIA provides this Court with “jurisdiction to enjoin [MSHA] from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

39. The Requested Documents are agency records within MSHA’s control. UEI, through counsel, properly requested production of the Requested Documents. UEI is entitled by law to obtain copies of the Requested Documents. MSHA has failed to produce the Requested Documents in violation of 5 U.S.C. § 552(a)(3)(A).

40. UEI requests that, pursuant to 5 U.S.C. § 552(a)(4)(B), the Court enjoin MSHA from withholding the Requested Documents and portions of the Requested Documents, and that it order MSHA immediately to produce the Requested Documents and previously-redacted material from the Requested Documents, together with an index that describes the documents and redacted material that have been withheld, to UEI. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

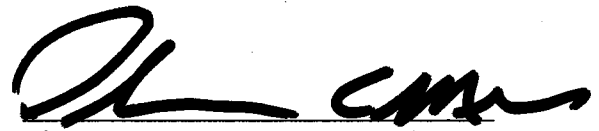
PRAYER FOR RELIEF

WHEREFORE, the Plaintiff UEI respectfully prays that this Court:

1. Declare that UEI is entitled to receive copies of the Requested Documents, that MSHA violated FOIA by failing to produce the Requested Documents within the time limits established by FOIA, that MSHA violated FOIA by redacting or withholding portions of the Requested Documents pursuant to improper claims of exemption, that MSHA violated FOIA by failing to provide an index describing the documents and redacted material that the agency withheld from disclosure, and that MSHA personnel acted arbitrarily and capriciously with respect to the withholding and redaction of the Requested Documents;
2. Order MSHA to cease withholding the Requested Documents from UEI and to produce the Requested Documents, and previously withheld or redacted portions of the Requested Documents, together with an index describing the documents and redacted material that the agency has withheld from disclosure, to UEI immediately;
3. Award reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E); and

4. Grant UEI such other and further relief as the Court may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas C. Means', is written over a horizontal line.

Thomas C. Means, No. 254318
J. Michael Klise, No. 412420
Willa B. Perlmutter, No. 461221
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Attorneys for Plaintiff
UtahAmerican Energy, Inc.

Dated: October 17, 2008